LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 22 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 35

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

BRIEF FOR THE PETITIONERS

ALFRED I. HOPKINS, TOBIAS SIMON
and HOWARD W. DIXON
223 Southeast First Street
Miami, Florida

and

CARL RACHLIN
280 Broadway
New York, New York
Attorneys for Petitioners

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes and Constitutional Provisions Involved	3
Statement of the Case	4
Summary of Argument	12
Argument:	
I. Petitioners were peaceable and orderly at all times; hence there was no evidence whatsoever to support the convictions below for unlawful assembly, and therefore Petitioners have been denied due process of law under the Fourteenth Amendment.	14
II. The convictions constituted a violation of Petitioners' rights of freedom of speech and freedom of assembly as guaranteed by the Fourteenth Amendment.	19
III. The arrests and convictions herein constituted an undue burden on interstate commerce in violation of interstate commerce clause of the Federal Constitution.	24
IV. The arrests and convictions herein constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.	26
Conclusion	27

TABLE OF AUTHORITIES CITED

Cases:	Page
Bailey v. *Patterson*, 369 U.S. 31; 7 L.Ed. 2d 512; 82 S.Ct. 549 (1962)	19
Baldwin v. *Morgan*, 287 F.2d 750 (5th Cir., 1961)	19
Beatty v. *Gillbanks*, 47 L.T. Rep. N.S. 194; 15 Cox C.C. 138; 9 Q. B. 308 (1882)	15
Boynton v. *Virginia*, 364 U.S. 454; 5 L.Ed.2d 206; 81 S. Ct. 182 (1960)	25
Brooks v. *Tallahassee*, 202 F. Supp. 56 (N.D. Fla., 1961)	20
Burton v. *Wilmington Parking Authority*, 365 U.S. 715; 6 L.Ed.2d 45; 81 S.Ct. 856 (1961)	19
Cantwell v. *Connecticut*, 310 U.S. 296; 84 L.Ed. 1213; 60 S.Ct. 900 (1940)	21
Coke v. *City of Atlanta*, 184 F. Supp. 579 (N.D. Ga., 1960)	19
Cooper v. *Aaron*, 358 U.S. 1; 3 L.Ed.2d 5; 78 S.Ct. 1401 (1958)	21
CORE v. *Douglas*, 31 Law Week 2571; ____ F.2d ____ (5th Cir., 1963)	21
DeJonge v. *Oregon*, 299 U.S. 353; 81 L.Ed. 278; 57 S.Ct. 255 (1937)	21

TABLE OF AUTHORITIES CITED (cont.)

Cases:	Page
Derrington v. *Plummer*, 240 F.2d 922 (5th Cir., 1956)	19
Edwards v. *California*, 314 U.S. 160; 86 L.Ed. 119; 62 S.Ct. 164 (1941)	24
Edwards v. *South Carolina*, 372 U.S. 229; 31 Law Week 4225 (1963)	21
Garner v. *Louisiana*, 368 U.S. 157; 7 L.Ed.2d 207; 82 S.Ct. 248 (1961)	17, 18
Henry v. *Greenville Airport Commission*, 279 F.2d 751 (4th Cir., 1960)	19
Kunz v. *New York*, 340 U.S. 290; 95 L.Ed. 280; 71 S.Ct. 312 (1951)	22
Morgan v. *Virginia*, 328 U.S. 373; 90 L.Ed. 1317; 55 S.Ct. 1050 (1946)	24
Niemotko v. *Maryland*, 340 U.S. 268; 95 L.Ed. 267; 71 S.Ct. 325 (1951)	22
Nesmith v. *Alford*, 31 Law Week 2622; ____ F.2d ____ (5th Cir., 1963)	21
People v. *Perry*, 193 N.E. 175 (N.Y., 1934)	14
Reg. v. *Clarkson*, 17 Cox's Criminal Law Cases 483 (Eng. 1892)	17
Rockwell v. *Morris*, 211 N.Y.S. 2d 25; aff'd 215 N.Y.S. 2d 502 (1961)	21

TABLE OF AUTHORITIES CITED (cont.)

Cases: Page

Schneider v. *Irvington*, 308 U.S. 147; 84 L.Ed. 155; 60 S.Ct. 146 (1939) 22

Sellers v. *Johnson*, 163 F.2d 877 (8th Cir., 1947) 21

State v. *Butterworth*, 142 A. 57; 58 A.L.R. 744 (N.J., 1928) 14

Taylor v. *Louisiana*, 370 U.S. 154; 8 L.Ed.2d 395; 82 S. Ct. 1188 (1962) 17

Terminiello v. *Chicago*, 337 U.S. 1; 92 L.Ed. 1131; 69 S. Ct. 894 (1949) 21

Thompson v. *City of Louisville*, 362 U.S. 199; 4 L.Ed.2d 654; 80 S.Ct. 624 (1960) 17

Turner v. *City of Memphis*, 369 U.S. 350; 7 L.Ed. 2d 762; 82 S.Ct. 805 (1962) 19

Yick Wo v. *Hopkins*, 118 U.S. 356; 30 L.Ed. 220; 6 S. Ct. 1064 (1886) 26

Constitutional and Statutory Provisions:

Federal Constitution, Fourteenth Amendment, § 1 ..... 14, 19

Federal Constitution, Interstate Commerce Clause 24

Florida Constitution, Article V, § 6(3) 2, 3

Florida Statutes, § 332.08 ..... 4, 20

Florida Statutes, § 870.04 3

City of Tallahassee Code, 1957, § 23-38 4

IN THE

Supreme Court of the United States

October Term, 1963

No. 35

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the court below, the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida (hereinafter referred to as the Circuit Court), affirming Petitioners' convictions by the trial court, is not reported, but is set forth in full in the Record. (R. 156)

JURISDICTION

The judgment of the Circuit Court was entered on August 16, 1962. (R. 156) The Petition for Writ of Certiorari was filed herein on November 13, 1962, and the Petition was granted by this Court on April 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Article V § 6(3) of the Constitution of the State of Florida provides that the Circuit Courts shall have final appellate jurisdiction of all cases arising in municipal courts. Petitioners were convicted by the Municipal Court of the City of Tallahassee, Florida, and the convictions were affirmed by the Circuit Court. As pointed out in the Petition for Writ of Certiorari and in Petitioners' Reply Brief filed herein, the Circuit Court is the highest court of the State of Florida in which a decision could be had within the meaning of 28 U.S.C. 1257.

QUESTION PRESENTED

Where a group of Negro and white clergymen, traveling in interstate commerce, gather at a municipally-owned and operated airline terminal building, with the announced purpose of determining whether the restaurant and other facilities in the building are racially unsegregated; and where the facilities are in fact segregated in favor of white persons only; and where a crowd gathers outside the terminal building and voices belligerent objection to the clergymen's views and purposes; and where the clergymen do not utter words of incitement or interfere with any busi-

ness of the terminal; and where the police arrest the clergymen for unlawful assembly, but arrest no one in the hostile crowd; did the subsequent convictions for unlawful assembly constitute (1) a denial of due process of law; (2) an abridgement of freedom of speech and freedom of assembly; (3) a violation of the interstate commerce clause; and (4) a denial of the equal protection of the laws?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment and the Interstate Commerce Clause of the Federal Constitution.

2. Article V, § 6(3) of the Florida Constitution, which provides, in pertinent part, that:

> "the Circuit Courts . . . shall have final appellate jurisdiction . . . of all cases arising in municipal courts . . . "

3. Florida Statutes, § 870.04, which provides in pertinent part as follows:

> "If any number of persons, whether armed or not, are unlawfully, riotously or tumultuously assembled in any county, city or municipality . . . any police officer . . . shall go among the persons so assembled, or as near to them as may be with safety, and shall in the name of the state command all the persons so assembled immediately

and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said officers shall command the assistance of all persons in seizing, arresting and securing such persons in custody . . . . "

4. Florida Statutes § 332.08, which provides in pertinent part that:

" . . . a municipality which has established . . . airports . . . or which has acquired or set apart or may hereafter acquire or set apart real property for such purposes, is hereby authorized . . .

(3) . . . to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services, and facilities; provided, that in each case in so doing the public is not deprived of its rightful equal and uniform use thereof."

5. § 28-38 of the 1957 City of Tallahassee Code, which provides as follows:

"It shall be unlawful for any person to commit, within the corporate limits of the city, any act which is or shall be recognized by the laws of the state as a misdemeanor, and the commission of any such acts is hereby forbidden." (R. 152)

STATEMENT OF THE CASE

This appeal is from a conviction of Petitioners for unlawful assembly. The City of Tallahassee charged that on June 16, 1961 the Petitioners unlawfully assembled in

the Tallahassee Municipal Airport in that they "met together to commit a breach of the peace, acting together and concertedly to occupy and to continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on the said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace", and that while so assembled a police officer went among them and commanded them to disperse, and they refused to obey the officer's command. (R. 1)

The charge was made and the convictions were had pursuant to § 23-38 of the 1957 City of Tallahassee Code, which incorporated by reference the State unlawful assembly statute, Florida Statutes, § 870.04, *supra*. (R. 157)

Petitioners were tried in the Tallahassee Municipal Court on June 22, 1961. The trial court denied Petitioners' several motions to quash and dismiss the charges (R. 4; 75), found the Petitioners guilty of unlawful assembly, as charged, and ordered them to pay fines of $500.00 each or alternatively to serve sixty days each in the city jail. (R. 144) Petitioners thereupon filed an appeal to the Supreme Court of Florida, which Court ruled that it lacked jurisdiction to entertain the appeal and transferred the cause to the Circuit Court (R. 153), which subsequently affirmed the judgments of the Municipal Court. (R. 156)

Petitioners, comprising a party of Negro and white

clergymen, had set forth together from Washington, D. C. to cities in several southern states for the purpose of determining whether certain interstate transportation facilities were available on an integrated basis for Negroes, and to identify themselves publicly with those groups opposed to practices of racial segregation. (R. 79, 95, 122, 126, 132) Petitioners left Washington, D. C. by bus and traveled to Tallahassee, Florida, passing through the states of Virginia, North Carolina, South Carolina, and Georgia en route. (R. 78, 79) Petitioners arrived at the Greyhound bus terminal in Tallahassee on June 15, 1961 and were met by a hostile crowd of persons who resented their presence and the purpose of their trip and who threatened them with mob violence. However, Petitioners were protected from this crowd by the local police at the bus terminal. (R. 8, *et seq.*) Meanwhile, Petitioners procured airline tickets for their return trip to their final destinations at New York City and Newark, New Jersey (R. 78), and left the bus terminal for the Tallahassee municipal airport preparatory to embarking upon their return flight, arriving there in the early afternoon of June 15, 1961. (R. 80)

Upon their arrival at the airport, Petitioners were met by another hostile crowd which also voiced belligerent objection to their presence and to the purpose of their trip and threatened them with violence. (R. 44 *et seq.*) A large number of police officers were present, and they formed a cordon around the airport terminal building to separate the hostile crowd from the Petitioners. (R. 22)

When they arrived at the airport terminal building, Petitioners sought to be served food and drink at the restaurant located therein and which was publicly designated for the use of white persons only. They discovered, how-

ever, that this restaurant was closed. (R. 82) Petitioners then waited for the restaurant to re-open and in that connection cancelled their reservations for their return trips scheduled for that evening and made new reservations for the following morning. They waited in the terminal building until approximately 11:00 P.M. that evening and then left without having obtained any restaurant service. (R. 82)

On the following morning of June 16, 1961, Petitioners returned to the airport and while waiting in the terminal building for their return flight again sought service in the restaurant. (R. 82) However, the restaurant was still closed and Petitioners again cancelled their reservations and made new reservations for their return flights for later that day. Again a large, hostile crowd gathered at the airport, and while Petitioners were thus seated in the terminal building and awaiting the opening of the restaurant, the City Attorney accompanied by the Chief of Police and other police officers, approached the Petitioners, and read to them a proclamation which commanded that they disperse immediately or else they would be arrested for unlawful assembly. (R. 15-17; Def. Ex. 2, R. 146)

Petitioners declined to disperse, and they were thereupon arrested by the police and taken into custody. (R. 18)

Within the Airport terminal building, which is owned and operated by the City of Tallahassee (R. 17), there are two eating establishments. The restaurant mentioned above is a glass-enclosed dining room, which was conspicuously designated for the exclusive use of white persons; the other

is a small lunch counter which was conspicuously designated for the exclusive use of Negroes. (R. 33) There were also separate and segregated waiting rooms for Negro and white passengers, and separate and segregated rest-rooms in the terminal building. (R. 34) The restaurant facilities are leased by the City to The American News Company, Inc., a Delaware corporation, pursuant to a lease dated October 20, 1960. (R. 104) The manager of the restaurant testified that Negroes were never served in the glass enclosed dining room. (R. 105)

Petitioners' conduct was peaceable at the time of their arrival in Tallahassee, during the time they were at the bus terminal, while they were at the airport terminal, and at the time of their arrest, and at all times material to this cause they were quiet, dignified and polite in their words and acts. The station manager of Eastern Airlines at the Tallahassee airport testified that:

> "They were very polite and very co-operative asking for what they wanted and how they wanted it." (R. 38)

The Chief of Police testified that they were merely sitting in the white waiting room and that he did not see them creating a disturbance. (R. 49, 51)

A police lieutenant testified that he did not hear any of the Petitioners make any threats. (R. 66) The Petitioners themselves testified that they were peaceable. Rev. J. W. Collier, Jr. testified as follows:

> "Q During the period of time that ensued from the moment you first arrived at the airport until

that time will you describe your conduct to the Court?

"A We sat in the lobby, in the waiting room; we read the newspapers; we read books which members of our party had with us and we quietly conversed among us.

"Q Were you loud, noisy or boisterous in any manner?

"A At no time in any way.

"Q Did you at any time threaten any person or persons?

"A We did not." (R. 84)

All of the Petitioners are men of the cloth. (R. 77-135, *passim.*)

Contrasted with the conduct and character of the Petitioners, was that of the crowd gathered outside the airport. The Chief of Police gave the following testimony:

"A It was generally talked around the terminal that there was possibly going to be some violence if the defendants continued to stay there." (R. 44)

* * * *

"Q Mr. Stoutamire, the question was rather long, but, in effect, it was did you have reason to believe that the continued presence of the defendants at the airport building would tend to incite a riot, cause a disturbance and disorderly conduct?

* * * *

"A I did, based on the facts that on Thursday night, what happened there then, and what the defendants requested, that they be protected and that they had requested protection the following morning back to the airport and when I got there with the Freedom Riders they there asked if I would give them protection while they was there." (R. 47)

* * * *

"A As I stated before the publicity that had been in the newspapers and on radios prior to them coming to Tallahassee about what had happened in other towns, the newspapers and radios that was giving the information that they would be here at a certain time, people in my opinion in the City and in the County was somewhat enraged about the fact that they were coming." (R. 52)

The police lieutenant testified to the same effect. (R. 64-67), and the State Attorney also testified that:

"From talking to the people there and seeing the scene I knew that those people outside would have given trouble if the officers had not been present to take care of the situation." (R. 73)

Notwithstanding the foregoing, however, the police made no effort to disperse this crowd (R. 64), and arrested no one in the crowd. (R. 50)

The Petitioners were at all times material to this cause passengers in interstate commerce and at all times

material to this cause possessed interstate airplane tickets and reservations. (R. 37, 41, 78)

As noted above, the announced purpose of the Petitioners' trip was to determine what facilities were available to Negroes on an unsegregated basis in the several transportation terminals they visited during the course of their trip and make known their opposition to racial segregation in such facilities. Thus Petitioner Collier testified:

> "A There was a two-fold purpose: First, we wanted to ascertain whether or not there were facilities available on an integrated basis to interstate passengers in waiting rooms, in restrooms, in eating facilities in the terminals through which we would pass.
>
> "Secondly, we wanted to bear our witness as ministers, rabbis and clergymen to the struggle to obtain these rights guaranteed us by the Constitution." (R. 79)

Petitioners Dresner, Freedman and Hartmire all testified to the same effect. (R. 95; 122; 132)

Notwithstanding the fact that the airport and the terminal building located thereon are owned and operated by the City of Tallahassee, the city and its lessee jointly maintain a policy of racial segregation in the restaurant facilities (R. 33-34; 105), and the lunch counter available to Negro passengers was an admittedly unequal facility. (R. 138-139) Moreover, these eating facilities were segregated notwithstanding the fact that the restaurants, together with the restrooms and waiting rooms, all formed an integral part of the airport terminal building. (R. 34; 87)

Although the white restaurant had been open and serving the white public prior to the Petitioners' arrival, it was closed during the entire time the Petitioners were in the terminal building and did not reopen until the Petitioners had left. Both the restaurant manager and the city manager testified that the restaurant was closed for two reasons: first, to repair certain refrigeration equipment, and secondly to avoid possible violence. (R. 102; 136-141)

SUMMARY OF ARGUMENT

1. The City failed to present evidence establishing the requisite elements of the offense of unlawful assembly; hence the convictions, without evidence, violated due process of law. Further, since there was no evidence of unlawful assembly, there was no adequate state ground for the convictions. Petitioners' conduct was peaceable at all times, and they uttered no words of incitement. The fact that others in the vicinity violently resented their objectives and sentiments regarding desegregation does not justify the convictions for unlawful assembly. Further, even though the Petitioners were in a public building, there is no evidence that they interfered in any way with the business or activities of the terminal building, the airlines, or any other passengers.

2. On the other hand, even assuming that the judgments of the Municipal Court and the opinion of the Circuit Court establish that under Florida law the offense of unlawful assembly was made out in the circumstances of this case, the convictions would necessarily be in violation of the rights of freedom of speech and assembly as guaranteed by the due process clause of the Fourteenth

Amendment. Petitioners assembled peaceably within the terminal building to protest illegal conduct by the City and the lessee-restaurant within the terminal building itself, i.e., their policies of racial segregation, and did so without interfering with the normal business of the terminal building, or the airlines, or other passengers. Consequently, Petitioners' conduct cannot be said to have presented a clear and present danger of any substantive evil, or to any substantial interest of the City, which could have justified such a denial of freedom of speech and assembly. Moreover, the fact that Petitioners' peaceable conduct, which protested the illegal practices of the City and its lessee, may have been the reason for the gathering of a hostile crowd, did not warrant their arrest and convictions, since Petitioners did not utter any words of incitement.

3. Since there was no city ordinance providing reasonable times for assemblies of persons within the terminal building, Petitioners had the right to so assemble there (a) so long as they did not interfere with the facilities of the terminal building, or the airlines, or other passengers; (b) since they all had flight reservations, and therefore legitimate business, in the terminal building; and (c) since the terminal building itself was the very locus of the unlawful racial segregation which the Petitioners were protesting.

4. The arrests and convictions herein constituted an undue burden on interstate commerce in that the City unlawfully interfered with Petitioners' rights of peaceful and unfettered travel in interstate commerce.

5. The actions of the police and cit yofficials in ar-

resting and convicting Petitioners, who were peacefully demonstrating against unlawful segregation and who were peacefully seeking unsegregated food service, and in failing and refusing to arrest a single person in the violent mob outside the terminal building, discriminatorily applied the City ordinance and the Florida unlawful assembly statute, and thus denied Petitioners the equal protection of the laws.

ARGUMENT

I.

Petitioners were peaceable and orderly at all times; hence, there was no evidence whatsoever to support the convictions below for unlawful assembly, and therefore Petitioners have been denied due process of law under the Fourteenth Amendment.

As stated in the Circuit Court's Opinion (R. 157), Petitioners were charged and convicted pursuant to §23-28 of the 1957 City of Tallahassee Code which incorporated by reference Florida Statutes, §870.04, *supra*. The gravamen of the charge, of the City Attorney's proclamation, and of the foregoing statute, is the offense of unlawful assembly. The Statute does not define the offense and it does not appear that the Florida Supreme Court has ever defined it or has ever interpreted this or any similar statute. Consequently, it is necessary to have recourse to the common law definition. *People* v. *Perry*, 193 N.E. 175 (NY., 1934) In the leading case of *State* v. *Butterworth*, 142 A. 57; 58 A.L.R. 744 (N.J., 1928), the Court stated that at common law:

> "in order to constitute the offense of unlawful assembly, it must appear that there was a common intent of the persons assembled to attain a purpose, whether lawful or unlawful, by the commission of such acts of intimidation and disorder which are likely to produce danger to the tranquility and peace of the neighborhood, and have a natural tendency to inspire rational, firm, and courageous persons in the neighborhood with well grounded fear of serious breaches of the public peace." 142 A. 57, 60.

That case involved the arrest of some 1,500 to 2,000 persons assembled to protest alleged suppression of union activities. The Court reversed the convictions and stated that:

> "Neither of the officers related a single act or alarming circumstance done or created by any one of the defendants or of any act threatening the public peace done by any of the persons assembled there, or which was of an unusual, boisterous, or disorderly nature." 142 A. 57, 60.

In the leading English case of *Beatty* v. *Gillbanks*, 47 L. T. Rep. N.S. 194; 15 Cox C.C. 138; 9 Q.B. 308 (1882), the defendants were members of the Salvation Army, which on previous occasions had paraded through an English town and collided with an antagonistic organization known as the "Skeleton Army", and great disorder had ensued. Thereafter, and notwithstanding an official notice directing all persons to abstain from assembling to the disturbance of the public peace, defendants led another procession through the streets, and were surrounded by a "tumultuous

and shouting mob of some hundred persons". The police ordered the defendants to disperse, but they refused, and they were arrested and convicted of unlawful assembly to the disturbance of the public peace. On appeal the convictions were set aside. The Appellee contended that similar parades in the past had resulted in riots, and that the defendants knew that such would occur if they paraded again. In reply, the Court declared that:

> "everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants, they would be liable, and the justices would have been right in binding them over. *But the evidence set forth in the case does not support this contention: on the contrary, it shews that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.*" 9 Q. B. 308, 311-312. (Emphasis supplied)

* * * *

> "What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, *that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a position*, and the question of the justices whether the facts stated in the case constitute the offence charged

> in the information must therefore be answered in the negative." 9 Q. B. 308, 312-313. (Emphasis supplied)

Accord: *Reg.* v. *Clarkson*, 17 Cox's Criminal Law Cases 483 (Eng. 1892).

The *Beatty* case is essentially on all fours with the case at bar, for there is not a scintilla of evidence in the record that Petitioners' conduct was anything but peaceable and orderly. Petitioners submit that it is an outrageous application of the doctrine of unlawful assembly to convict peaceable persons simply because others, who belligerently object to their presence, but who are in no way threatened with any personal or proprietary damage, threaten to become disorderly. Such has not been the law of unlawful assembly and so to distort it in this case would be to allow a conviction to stand without evidence to support it and in violation of due process of law. *Taylor* v., *Louisiana*, 370 U.S. 154; 8 L.Ed.2d 395; 82 S.Ct. 1188 (1962); *Garner* v. *Louisiana*, 368 U.S. 157; 7 L.Ed.2d 207; 82 S.Ct. 248 (1961); and *Thompson* v. *City of Louisville*, 362 U.S. 199; 4 L.Ed.2d 654; 80 S.Ct. 624 (1960). Petitioners point out that in *Taylor*, the Court found that there "was no evidence of violence"; that the record "shows that petitioners were quiet, orderly, and polite"; and that "the only evidence to support the charge was that petitioners were violating a custom that segregated people in waiting rooms according to their race, a practice not allowed in interstate transportation facilities by reason of federal law." 370 U.S. 154, 155-156; 8 L.Ed.2d 395, 396.

The Court will also note that the language of Florida Statutes §870.04, *supra*, is directed at persons "unlawfully,

riotously, or tumultuously assembled." Since Petitioners were not assembled "unlawfully" within the meaning of the common law as noted above, and since the record shows that they were not assembled "riotously or tumultuously", the convictions were not supported by evidence to make out the offense described by the Florida statute.

Finally, the Circuit Court in its opinion made certain assumptions concerning the effect of the Petitioners' conduct which are in no way supported by the record. The Circuit Court asserted that the facilities of the terminal building were denied to other persons, that the airline was inconvenienced, and that other would-be travelers were denied space on air flights. (R. 164, 165) However, there is absolutely no evidence in the record that any persons having business in the terminal were inconvenienced or denied the use of the facilities or services of the airline, or that any other passengers were in any way inconvenienced. Certainly as the court indicated in *Garner*, the Circuit Court could not take judicial notice of such presumed "facts" without violating due process of law. 7 L.Ed. 2d 207, 219.

Petitioners submit, therefore, that there was not an adequate state ground for the convictions, and that the convictions without evidence, violated due process of law.

II.

The convictions constituted a violation of Petitioners' rights of freedom of speech and freedom of assembly as guaranteed by the Fourteenth Amendment.

Even assuming, *arguendo*, that Petitioners' conduct could be deemed to have constituted a common law or statutory crime under Florida law, nevertheless their convictions cannot be squared with the rights of freedom of speech and freedom of assembly guaranteed by the Fourteenth Amendment. The announced purpose of their trip was to determine whether restaurants and other facilities in interstate transportation terminals were available to Negroes on an unsegregated basis, and they assembled and demonstrated peacefully to communicate their opposition to these illegitimate practices of racial segregation. Their objectives were clearly lawful, since "no State may require racial segregation of interstate or intrastate transportation facilities." *Bailey* v. *Patterson*, 369 U.S. 31, 33; 7 L.Ed.2d 512, 514; 82 S.Ct. 549 (1962); *Turner* v. *City of Memphis*, 369 U.S. 350; 7 L.Ed.2d 762; 82 S.Ct. 805 (1962); *Baldwin* v. *Morgan*, 287 F.2d 750 (5th Cir., 1961); *Henry* v. *Greenville Airport Commission*, 279 F.2d 751 (4th Cir., 1960); *Derrington* v. *Plummer*, 240 F.2d 922 (5th Cir., 1956); *Coke* v. *City of Atlanta*, 184 F.Supp. 579 (N.D. Ga., 1960); Cf. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; 6 L.Ed.2d 45; 81 S.Ct. 856 (1961).

Indeed, the action of the City officials and the American News Company in maintaining segregated restaurant facilities was in blatant violation of the law of the State of

Florida, viz., Florida Statutes §332.08(3) which authorizes municipalities to:

> "confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; *provided, that in each case in so doing the public is not deprived of its rightful equal and uniform use thereof.*" (Emphasis supplied)

If any further or final proof of the legitimacy of this Freedom Ride were needed, it was clearly provided by the case of *Brooks* v. *Tallahassee*, 202 F. Supp. 56 (N.D. Fla., 1961) where, subsequent to the convictions below, suit was brought against the City of Tallahassee to enjoin any further racial segregation in the Tallahassee airport terminal itself and appropriate injunctive relief was granted by the District Court.

Since the Petitioners' objectives were legitimate and their assembly was peaceable, since there is no evidence that their assembly interfered with the normal functions of the terminal building, or the operations of the airlines, or with other passengers, can we say that they created such a clear and present danger of any substantive evil or to any substantial municipal interest which could have justified their convictions? The complaint of the Circuit Court, the Municipal Court and the City officials appears to be two-fold: (1) that there was danger of public disorder because of Petitioners' locally unpopular views on racial desegregation; and (2) that the assembly, having taken place in the airport terminal building, wrongfully interfered with the facilities of that building.

The short answer to the first objection is that, absent the use of words of incitement, the mere fact that the announcement of unpopular views may provoke others to commit or threaten to commit acts of disorder in no way justifies state action in derogation of the rights of freedom of speech and freedom of assembly. *Edwards* v. *South Carolina*, 372 U.S. 229; 31 Law Week 4225 (1963); *Cantwell* v. *Connecticut*, 310 U.S. 296, 84 L.Ed. 1213; 60 S.Ct. 900 (1940); *Terminiello* v. *Chicago*, 337 U.S. 1; 93 L.Ed. 1131; 69 S.Ct. 894 (1949); *De Jonge* v. *Oregon*, 299 U.S. 353; 81 L.Ed. 278; 57 S.Ct. 255 (1937); *CORE* v. *Douglas*, 31 Law Week 2571; ___F.2d___ (5th Cir., 1963); *Nesmith* v. *Alford*, 31 Law Week 2622; ___F.2d___ (5th Cir., 1963); *Sellers* v. *Johnson*, 163 F.2d 877 (8th Cir., 1947); *Rockwell* v. *Morris*, 211 N.Y.S.2d 25; aff'd 215 N.Y.S.2d 502 (1961); Cf. *Cooper* v. *Aaron*, 358 U.S. 1, 3 L.Ed.2d 5; 78 S.Ct. 1401 (1958).

As to the second objection, Petitioners submit that since there was no statute or ordinance in effect regulating the time, place and manner of public assemblies in the terminal building, the Petitioners, having acted and assembled peaceably and for a legal objective, had the right to assemble and demonstrate in the terminal building, since it was the very site of the evil of which they complained. In *Edwards* v. *South Carolina*, *supra*, the Petitioners comprised a group of 187 Negroes who had assembled on the grounds of the South Carolina State House and a crowd of 200 to 300 onlookers had collected around them. This Court stated:

> "We do not review in this case criminal convictions resulting from the even-handed application of a precise and narrowly drawn regulatory stat-

> ute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308; *Garner* v. *Louisiana*, 368 U.S. 157, 202 (concurring opinion). These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, 'not susceptible of exact definition.' And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." 31 Law Week 4225, 4227.

Compare *Schneider* v. *Irvington*, 308 U.S. 147; 84 L.Ed. 155; 60 S.Ct. 146 (1939) and *Kunz* v. *New York*, 340 U.S. 290; 95 L.Ed. 280; 71 S.Ct. 312 (1951), where the Court upheld the right of speech and assembly in such public and municipally-owned areas as streets and parks.

In *Niemotko* v. *Maryland*, 340 U.S. 268; 95 L.Ed. 267; 71 S.Ct. 325 (1951), the appellant had been convicted of disorderly conduct for holding a meeting of Jehovah's Witnesses in a public park without a permit. There was no city ordinance regulating the use of the parks, and the Court stated that:

> "The conclusion is inescapable that the use of the

> park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." 340 U.S. 268, 272; 95 L.Ed. 267, 271.

So, in the case at bar, "the conclusion is inescapable" that the City's interference with Petitioners' assembly was the result of the unpopularity of their views. This is made eminently clear from the trial court's views on "public order" made at the conclusion of the trial:

> "Gentlemen, it is not my business to lecture but I want to assure you that if I thought for one minute or if the facts in this case supported the thought for one minute that you all came here on a noble, Christian purpose and had acted accordingly when instructed to vacate and leave that you would not be here. I am not attempting to change wish that you would stop and think this: When you do get back home to your respective cities that you would check the criminal rates and the prostitution rates and the racial strife as compared to what you find in Tallahassee and then when you have cleaned up your own bailiwick or whatever it is, then we would welcome your suggestions.
>
> "Until that time I think you have more than you can do at home. You came here for the sole

purpose of forcing your opinions and your views on this community. No matter how noble your reasoning sounds to you or how you have testified in this court it all boils down simply to that fact. You all have traveled a thousand miles in order to be deprived of something that you had at home already and then you get all of the United States embroiled in something." (R. 145)

III.

The arrests and convictions herein constituted an undue burden on interstate commerce in violation of the interstate commerce clause of the Federal Constitution.

This Court has held that the states may not impose unreasonable restraints on passengers traveling in interstate commerce and undue burdens on such travelers have been held to be unconstitutional. *Morgan* v. *Virginia*, 328 U.S. 373; 90 L.Ed. 1317; 55 S.Ct. 1050 (1946); *Edwards* v. *California*, 314 U.S. 160; 86 L.Ed. 119; 62 S.Ct. 164 (1941).

In the case at bar, Petitioners were passengers in interstate commerce, they were peaceful in their conduct at all times in the course of their travel, and the purpose of their trip was perfectly lawful. Certainly the City had no such legitimate interest in convicting Petitioners which could have justified the restraints it imposed on their rights of peaceful and unfettered travel in interstate commerce.

Moreover, the City unlawfully interfered with Petitioners' right to eat, as guaranteed to passengers in transit

in interstate commerce. In *Boynton* v. *Virginia*, 364 U.S. 454, 463; L.Ed.2d 206, 212; 81 S.Ct. 182 (1960), the Court stated that:

> "Interstate passengers have to eat, and the very terms of the lease of the built-in restaurant space in this terminal constitute a recognition of the essential need of interstate passengers to be able to get food conveniently on their journey and an undertaking by the restaurant to fulfill that need."

Here, as in *Boynton*, the terminal restaurant was an integral part of the terminal facilities. (R. 34; 87) Further, the Petitioners testified at length as to their desire to eat at the restaurant. Petitioner Collier stated:

> "Our purpose was, inasmuch as there was time prior to the departure of the plane and since I among others had not eaten, to eat prior to leaving and to test the facilities as I indicated earlier." (R. 162)

Petitioner Collier further stated that his purpose in returning to the airport on the morning of June 16 was: "To be served in the restaurant prior to leaving." (R. 83) Petitioners Dresner, Warner and Hartmire testified to like effect. (R. 123; 126; 133)

Petitioners contend, therefore, that the City interfered with this right to eat, which for interstate passengers is a right recognized and protected by the Court's ruling in *Boynton* v. *Virginia, supra.*

IV.

The arrests and convictions herein constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The police and city officials in arresting and convicting the Petitioners, who were peacefully demonstrating against unlawful racial segregation and who were peacefully seeking unsegregated food service, and in failing and refusing to arrest a single person in the violent mob outside the terminal building, discriminatorily applied the city ordinance and Florida Statutes §870.04, and in violation of the principle announced by the Court in *Yick Wo* v. *Hopkins*, 118 U.S. 356; 30 L.Ed. 220; 6 S.Ct. 1064 (1886), where the Court held that:

> "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

CONCLUSION

For the foregoing reasons Petitioners pray that the judgments below be reversed, that the convictions be set aside and that the charges be quashed and dismissed.

Respectfully submitted,

ALFRED I. HOPKINS, TOBIAS SIMON,
and HOWARD W. DIXON
223 Southeast First Street
Miami, Florida

and

CARL RACHLIN
280 Broadway
New York, New York
Attorneys for Petitioners

By_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for the Petitioners has, pursuant to Rule 33 (1) of the Rules of The Supreme Court of the United States, been served by air mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahassee, Florida, this _____ day of August, 1963.

_____